BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

PAMELA KAY BARNETT Claimant VS. **KENWOOD VIEW HEALTHCARE** Respondent AND **AMERICAN ZURICH INSURANCE CO.** Insurance Carrier	)	Docket No. 1,067,808

ORDER

STATEMENT OF THE CASE

Claimant and respondent and its insurance carrier (respondent) requested review of the May 22, 2014, preliminary hearing Order entered by Administrative Law Judge (ALJ) Bruce E. Moore. Kelly W. Johnston of Kechi, Kansas, appeared for claimant. James P. Wolf of Kansas City, Kansas, appeared for respondent.

On January 23, 2014, the ALJ initially ordered a neutral independent medical evaluation (IME) to determine claimant's condition and ordered medical management for claimant pending the results of the IME. In his subsequent May 22, 2014, Order, the ALJ found claimant suffered a compensable accident on July 13, 2013; however, he determined claimant failed to establish the work-related accident was the prevailing factor in causing her current need for treatment. The ALJ denied claimant's request for medical treatment.

The record on appeal is the same as that considered by the ALJ and consists of the transcript of the January 22, 2014, Preliminary Hearing and the exhibits, together with the pleadings contained in the administrative file.

ISSUES

Claimant argues she established a persuasive evidentiary basis for a finding of a compensable accident and medical condition. Claimant contends, "Once it is persuasively determined that the accident was the prevailing factor in causing a 'medical condition', then

that ends the analysis. At that point, K.S.A. 44-510h becomes the lynch pin [*sic*] for medical care decision-making by the authorized physician."[1]

Respondent maintains the preponderance of credible evidence indicates claimant failed to prove she sustained an accidental injury arising out of and in the course of her employment and that the work incident was the prevailing factor in causing her injury, medical condition, and disability. In the alternative, respondent argues treatment should be limited to the initial sprain/strain only and not as it relates to claimant's preexisting degenerative condition.

The issues for the Board's review are:

1. Did claimant sustain a personal injury by accident arising out of and in the course of her employment with respondent?

2. What is the prevailing factor in claimant's injury, medical condition, and need for medical treatment?

FINDINGS OF FACT

Claimant has been a certified nursing assistant (CNA) for respondent since October 30, 2012. Claimant stated she sustained an injury on July 13, 2013, when a resident, seated at a dining table, grabbed claimant around the neck and pulled her into the resident's chest. Claimant testified she "got slammed on the table, pulled down onto the table. [Her] feet came up off of the floor."[2] Claimant remained in this position for over one minute, attempting to release herself by pushing on the resident's elbow. Claimant stated the resident was a large person, and claimant was unable to move the resident's arm. Claimant continued to speak with the resident and was eventually released. Claimant testified she felt burning in her neck at this time.

Claimant stated she remained near the resident so the resident would not feel abandoned. Claimant proceeded to speak to the resident, and the resident again grabbed claimant and pulled her down. Claimant's feet became tangled when she tried to catch herself. She testified:

> Q. And how did the trunk of your body move because of that situation with your feet?

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[1] Claimant's Brief (filed June 9, 2014) at 6.

[2] P.H. Trans. at 18.

> A. Didn't move too well. I felt the instant when I came down, came around to catch up, felt more in the neck, and I felt it in the back, but just the neck is, you know, was what I was concerned about at the time.[3]

Claimant remained in this position for approximately 30 to 45 seconds before the resident again released her. Claimant then left the room and informed her nurse of the incident. Claimant completed an incident report and left work before the end of her shift. The next day, Sunday, July 14, 2013, claimant informed her administrator of back pain and was told to take the day off. Claimant testified she experienced headaches and a stiff neck following the incident. Claimant returned to respondent to complete paperwork on Monday, July 15, 2013. Respondent sent claimant to Dr. James Shafer.

Dr. Shafer first examined claimant on July 15, 2013. Claimant complained of pain and stiffness in her neck down to her lower back. Dr. Shafer diagnosed claimant with lumbar and neck strain, and he prescribed medication, physical therapy, and restricted claimant to light duty. Claimant followed up with Dr. Shafer multiple times. Claimant's neck condition resolved by August 5, 2013, but she continued to suffer low back pain with right leg radiculopathy. Dr. Shafer provided injections and an MRI. On August 9, 2013, Dr. Shafer noted:

> We did the MRI. It showed that she has a grade 1 anterolisthesis L5 on S1 causing severe bilateral neuroforaminal narrowing and impingement upon those nerves, that should have been there for a while, may be it has flared up by the injury I do not know. Also, at L5-S1, has central disc protrusion, but not causing any neural foraminal narrowing.[4]

Dr. Shafer recommended claimant continue physical therapy and medication with light duty employment.

Claimant was next examined by Dr. Denise Weiss on September 11, 2013. Dr. Weiss provided a series of epidural steroid injections through October 2013 before recommending a neurosurgical evaluation. Dr. Shafer agreed with this assessment and referred claimant to Dr. Ali Manguoglu, a neurosurgeon.

Claimant testified she visited with Dr. Manguoglu one time. Records indicate Dr. Manguoglu examined claimant on October 25, 2013, and diagnosed claimant with L5-S1 spondylolisthesis. Dr. Manguoglu referred claimant to Dr. Scott Boswell, a neurosurgeon, for consideration of surgical treatment.

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[3] *Id*. at 19-20.

[4] *Id*., Cl. Ex. 4 at 2.

Dr. Boswell commenced treatment of claimant on October 28, 2013. Claimant complained of back pain and bilateral leg pain. Dr. Boswell diagnosed claimant with spondylolisthesis and lumbar stenosis at L5-S1. Dr. Boswell noted claimant's remaining treatment option was a spinal fusion at L5-S1 because non-surgical treatment failed to provide adequate pain relief. Claimant agreed, and surgery was scheduled for November 2013. The surgery did not occur because it was not authorized. Claimant indicated to Dr. Boswell she had no symptoms prior to the incident of July 13, 2013. Dr. Boswell wrote, "It is my opinion within reasonable medical probability that this event is a prevailing reason for the annular tear, disc pathology, and spondylolisthesis of her spine."[5]

Dr. George Fluter examined claimant at her counsel's request on December 17, 2013, for purposes of an IME and treatment recommendations. Claimant complained of ongoing, daily low back pain with numbness into the right lower extremity and foot. Additionally, claimant informed Dr. Fluter she had no prior injuries to or problems with her lower back. Dr. Fluter reviewed claimant's medical records, history, and performed a physical examination. Dr. Fluter assessed claimant with status post work-related injury, neck/upper back pain, cervicothoracic strain/sprain, low back/right lower extremity pain/dysesthesia, lumbosacral strain/sprain, lumbar discopathy at L4-5 and L5-S1, probable lower extremity radiculitis, and L5-S1 spondylolysis with spondylolisthesis.[6] Dr. Fluter recommended temporary restrictions and treatment with medication, including the surgical treatment previously outlined by Dr. Boswell.

Claimant settled a prior workers compensation claim on May 16, 2013, for an incident occurring at a different employer on April 6, 2011. Claimant alleged injuries to the neck and right shoulder as a result of the work-related accident and subsequently underwent two surgeries to the right shoulder. Claimant received a running award representing an approximate 6.5 percent permanent impairment of function to the body as a whole and a 5 percent impairment of function to the right shoulder as a result of the settlement. Also as part of the agreement, any and all issues related to claimant's alleged neck injury were closed out.

Dr. Fluter noted in his IME claimant's prior April 2011 injury involving the neck and right shoulder. He opined the work-related incident of July 2013 aggravated claimant's neck/upper back condition. Dr. Fluter also indicated there is an existing causal/contributory relationship between claimant's current condition and the reported work-related injury occurring July 13, 2013. Regarding prevailing factor, Dr. Fluter wrote:

> The prevailing factor for the injury and the need for medical evaluation/treatment is the reported work-related injury occurring on [July 13, 2013]. The available information indicates that the spondylolysis/spondylolisthesis at L5-S1 appeared

[5] P.H. Trans., Cl. Ex. 1 at 1.

[6] See P.H. Trans., Cl. Ex. 3 at 4.

> chronic; this along with the disc bulge resulted in severe bilateral neuroforaminal narrowing. . . .
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> While the L5-S1 pars defects, spondylolysis, and spondylolisthesis may have been preexisting, there is no clear indication that the diffuse posterior disc bulge and the L4-5 central annular tear/central disc protrusion were present prior to the injury occurring on 07/13/13. [Claimant] reports having had no prior injuries to or problems with her low back. If the L5-S1 disc bulge and the L4-5 annular tear/disc protrusion were preexisting conditions, then it is difficult to explain why they were asymptomatic prior to the injury occurring on 07/13/13.[7]

Respondent referred claimant to Dr. Chris Fevurly on January 14, 2014, for IME purposes. Claimant was examined by Dr. Fevurly. Her complaints included severe low back pain radiating into the right buttocks which is intermittent and present most of the time. She also complained of frequent radiation of pain into the right lower extremity, but she informed Dr. Fevurly the back pain is "ten times worse" than the right leg symptoms.[8] Claimant reported she had no lumbar or right leg pain prior to July 13, 2013. After reviewing claimant's medical records, history, and performing a physical examination, Dr. Fevurly noted the following assessment:

> Axial lumbar pain with no current examination evidence for right leg radiculitis or radiculopathy.
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> MRI findings of chronic, preexisting L5 spondylolysis with resulting grade I anterolisthesis of L5 on S1.
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> - These MRI findings are chronic, degenerative or developmental in nature and not causally related to the work event on 7/13/13.
> - These findings may or may not have any clinical connection to her current low back pain.
>
> Current numbness in the right lateral thigh consistent with meralgia paresthetica (lateral curtaneous femoral neuritis) unrelated to the low back complaints.
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> There is current examination evidence for nonphysiologic findings and exaggerated pain behaviors consistent with symptom magnification.[9]

Dr. Fevurly opined claimant's cervicothoracic aggravation resulting from the July 13, 2013, incident reached maximum medical improvement by September 2013. Further, Dr. Fevurly indicated claimant's current low back and right leg complaints are not causally

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[7] *Id*. at 5.

[8] P.H. Trans., Resp. Ex. B at 5.

[9] *Id.* at 7-8.

related to the July 2013 injury, but they are likely associated with the preexisting degenerative changes at L5-S1. He wrote:

> The prevailing factor for the current complaints preexisted the work events on 7/13/13 and are the degenerative changes seen at L5 (pars interarticularis defect) and the mild anterolisthesis of L5 on S1. The work event or alleged injury on 7/13/13 is not the prevailing factor for her low back pain. In addition, the chronic pain is likely associated with preexisting psychological, social, behavioral and environmental risk factors.[10]

Using the AMA *Guides*,[11] Dr. Fevurly opined claimant sustained no permanent impairment to either her cervicothoracic or lumbar spine as a result of the work-related incident. Further, Dr. Fevurly indicated there are no current permanent restrictions or limitations as a result of the July 2013 event. Dr. Fevurly opined claimant is not a good surgical candidate for low back surgery, and the prognosis from surgical intervention is poor.

On January 22, 2014, claimant testified she had never sustained a low back injury prior to July 13, 2013. She further stated she never previously complained of low back pain to a health care provider, never reported an accident to anyone involving her low back, and never sought chiropractic treatment.[12]

Dr. Mark Bernhardt, a court-ordered neutral examiner, evaluated claimant on May 2, 2014, for IME purposes. After taking claimant's medical history, Dr. Bernhardt noted in his report:

> [Claimant] states that she was seen in the emergency room in her 20s for a back strain. She was treated with Ibuprofen, her symptoms spontaneously resolved, and she returned to normal activities without a history or recurring low-back pain problems. [Claimant] suffered from low-back pain in 1996-1997 when pregnant. Her back pain resolved with bedrest and delivery of her son. She states that after recovery from her pregnancy-related low-back pain, she did not suffer recurring low back pain problems.[13]

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[10] *Id*. at 9.

[11] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[12] See P.H. Trans. at 14-15.

[13] Bernhardt IME (May 2, 2014) at 3.

Dr. Bernhardt reviewed claimant's medical records as well, which revealed claimant visited the emergency room for acute low back pain on August 25, 2007, and was diagnosed with acute lumbar strain at that time.

Dr. Bernhardt performed a physical examination of claimant and diagnosed acute cervical strain, resolved; acute lumbosacral strain syndrome; chronic low back pain; chronic lumbar radiculitis, right leg; lumbosacral spondylosis; L5-S1 isthmic spondylolisthesis; bilateral L5 foraminal stenosis; Scheuermann's infraction of adolescence, thoracolumbar spine; and degenerative disc disease at L4-5.[14] Dr. Bernhardt opined claimant was not an ideal surgical candidate, and she should instead continue conservative pain treatment with activity restriction/modification. He indicated claimant is capable of working with permanent light duty restrictions.

Regarding prevailing factor, Dr. Bernhardt wrote:

> [Claimant] suffered an acute lumbosacral strain/sprain syndrome in her work accident of July 13, 2013. It is my opinion that she aggravated pre-existing conditions in her work accident of July 13, 2013. The pre-existing conditions aggravated were her L5-S1 isthmic spondylolisthesis and L4-5 degenerative disc. The prevailing factor in causing [claimant's] need for diagnosis and early treatment of her strain/sprain syndrome was her work injury of July 13, 2013. The prevailing factors in causing her continued pain, continued treatment of her pain, including consideration of surgery for her pain problem, are her pre-existing L5-S1 isthmic spondylolisthesis and pre-existing L4-5 degenerative disc.[15]

PRINCIPLES OF LAW

K.S.A. 2013 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
>
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.

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[14] See *id.* at 5-6.

[15] *Id*. at 7.

(c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2013 Supp. 44-508(h) states:

"Burden of proof" means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record unless a higher burden of proof is specifically required by this act.

K.S.A. 2013 Supp. 44-508(d) states:

"Accident" means an undesigned, sudden and unexpected traumatic event, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. An accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift. The accident must be the prevailing factor in causing the injury. "Accident" shall in no case be construed to include repetitive trauma in any form.

K.S.A. 2013 Supp. 44-508(f) states, in part:

(f)(1) "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto. Personal injury or injury may occur only by accident, repetitive trauma or occupational disease as those terms are defined.

(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.

. . . .

(B) An injury by accident shall be deemed to arise out of employment only if:

(i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and

(ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.

K.S.A. 2013 Supp. 44-508(g) states:

> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

By statute, preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[16] Moreover, this review of a preliminary hearing order has been determined by only one Board Member, as permitted by K.S.A. 2013 Supp. 44-551(l)(2)(A), as opposed to being determined by the entire Board as it is when the appeal is from a final order.[17]

ANALYSIS

1. Did claimant sustain a personal injury by accident arising out of and in the course of her employment with respondent?

Claimant's testimony regarding the circumstances of her work-related injury are uncontroverted. Uncontroverted evidence may not be disregarded and is generally regarded as conclusive absent a showing it is improbable or untrustworthy.[18] The undersigned Board Member finds claimant suffered an injury arising out of and in the course of her employment.

2. What is the prevailing factor in claimant's injury, medical condition, and need for medical treatment?

The evidence presented at the January 27, 2014 preliminary hearing included an opinion from Dr. Fevurly that claimant's injury was not the prevailing factor for her condition and need for medical treatment. The record also included as evidence two opinions claimant's injury was the prevailing factor for her injury and need for medical treatment. The two positive prevailing factor opinions were from Drs. Fluter and Boswell. Claimant was referred to Dr. Boswell by respondent's authorized physician, Dr. Shafer.

On its face, the evidence submitted at the hearing supported a finding the injury was the prevailing factor for claimant's need for the requested medical treatment based upon

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[16] K.S.A. 44-534a; see *Quandt v. IBP*, 38 Kan. App. 2d 874, 173 P.3d 1149, *rev. denied* 286 Kan. 1179 (2008); *Butera v. Fluor Daniel Constr. Corp.*, 28 Kan. App. 2d 542, 18 P.3d 278, *rev. denied* 271 Kan. 1035 (2001).

[17] K.S.A. 2013 Supp. 44-555c(j).

[18] See *Anderson v. Kinsley Sand & Gravel*, Inc., 221 Kan. 191, 558 P.2d 146 (1976).

the opinion of the authorized treating physician. Notwithstanding the evidence, the ALJ ordered an IME with Dr. Bernhardt. Dr. Bernhardt opined claimant's injury was not the prevailing factor in causing her current need for medical treatment.

For the purposes of this review in this particular case, as no foundation for medical opinions is required pursuant to K.S.A. 2013 Supp. 44-534a, the undersigned Board Member assesses equal weight to each physician's prevailing factor opinion. As such, the evidence supports a finding it is equally probable claimant's work-related injury is or is not the prevailing factor for her need for medical treatment. The undersigned finds claimant has failed to prove it is more probably true than not true on the basis of the whole record her work-related injury was the prevailing factor causing her need for medical treatment.

CONCLUSION

Claimant suffered an injury arising out of and in the course of her employment with respondent. Claimant failed to prove it is more probably true than not true on the basis of the whole record her work-related injury was the prevailing factor causing her need for medical treatment.

ORDER

WHEREFORE, it is the finding, decision and order of this Board Member that the Order of Administrative Law Judge Bruce E. Moore dated May 22, 2014, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of July 2014.

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HONORABLE SETH G. VALERIUS
BOARD MEMBER

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